

DOCUMENT RESUME

ED 224 108

EA 015 193

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TITLE The Supreme Court and Educational Policy: The Protected Interests in Education.
PUB DATE Aug 82
NOTE 26p.; Paper presented at the Annual Meeting of the National Conference of Professors of Educational Administration (36th, San Marcos, TX, August 15-20, 1982).
PUB TYPE Speeches/Conference Papers (150) --
Legal/Legislative/Regulatory Materials (090) --
Viewpoints (120)
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Access to Education; *Constitutional Law; *Due Process; Educational Discrimination; Educational Opportunities; Elementary Secondary Education; *Equal Education; *Equal Protection; Expulsion; Financial Support; Illegal Immigrants; School Support; *Student Rights
IDENTIFIERS Fourteenth Amendment; Goss v Lopez; Meyer v Nebraska; *Right to Education; Rodriguez v San Antonio Independent School Dist; Supreme Court

ABSTRACT

The nature of the interests in education that are protected by the Constitution may be ascertained by reference to certain due process and equal protection decisions of the Supreme Court reviewed in this paper. Although education is not a right granted by the Constitution, the Court has often recognized the importance of education, both to the individual and to the society. It seems that in terms of constitutional protections the Court has now accorded a sort of favored legal status to education although the exact nature of this status is unclear. The basic education necessary for functional literacy may be the extent of the protected interest. Although how this level of education is to be defined or measured is uncertain, what does seem clear is that the Constitution protects the individual against inequitable and unfair state action. Whatever educational opportunities the state does choose to provide, neither a discrete class nor a single individual may be unfairly excluded from access to those opportunities. Although the Fourteenth Amendment does not extend to every person the guarantee of success, the concepts of due process and equal protection do shield each person from state-imposed failure. (Author/JM)

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The Supreme Court and Educational Policy:
The Protected Interests in Education

A paper prepared for presentation at the
National Conference of Professors of Educational Administration
held at
Southwest Texas State University
San Marcos, Texas
August 1982

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I. INTRODUCTION

The Constitution of the United States does not provide specifically for education. Nevertheless, constitutional law, as expressed by the decisions of the United States Supreme Court, has had a substantial impact on American education. Among the more interesting questions involving constitutional law and American educational policy are whether there is a right to education protected by the Constitution, and if so, what is the nature of that right. This paper is an examination of those related issues.

The Fourteenth Amendment provides that "[n]o state shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The nature of the interests in education that are protected by the Constitution has been generally established by a number of major decisions in which the Supreme Court has applied the mandates of due process and equal protection. We now turn to an analysis of those decisions.

II. SUBSTANTIVE CONSTITUTIONAL RIGHTS

There are certain substantive personal rights that the Constitution protects against unjustified interference by the State. The Bill of Rights and the Fourteenth Amendment are the basic sources of these protections.

An appropriate place to begin an analysis of the Supreme Court's consideration of education in the context of Fourteenth Amendment rights is Meyer v. Nebraska.¹ In that 1923 decision, the Court seemed to recognize the existence of some liberty interest in education that was protected by substantive due process.

The Meyer court struck down a Nebraska statute that prohibited the teaching of a modern foreign language to a child who had not passed the eighth grade, and overturned the misdemeanor conviction of a teacher who had taught reading in German to a 10-year-old child. The issue in Meyer was whether the statute unreasonably infringed on the liberty guaranteed to the teacher by the Due Process Clause of the Fourteenth Amendment.

In the course of determining the nature of this liberty interest, the Court also alluded to the interests of students and parents in the educational process.

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.²

This decision was rendered during the era of substantive due process review,

when the Court not only took a rather broad view of what constituted a protected liberty interest, but also demonstrated a certain willingness to invalidate legislation that interfered with the exercise of that liberty. The court clearly followed this approach in Meyer.

The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.³

Both the nature of the interest and the intent of the legislation were examined. The Court recognized the importance of education and of access to educational opportunities. "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."⁴ It was also pointed out that parents had a natural duty to give their children a suitable education and that nearly all states enforced that obligation by compulsory attendance laws.

The purpose of the legislation was said to be the promotion of civic development by inhibiting education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals. The Court acknowledged that the state could do much to improve the quality of its citizens, and that it was easy to appreciate the desire of the legislature to foster a homogeneous people with American ideals and the ability to understand discussion of civic matters.

However, the Court believed that the legislative interference "with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own"⁵

exceeded the limitations on the power of the state and conflicted with the rights of the teacher. The Court concluded that the statute as applied was arbitrary and without reasonable relation to any end within the competency of the state.

Although Meyer did suggest that a child might have a protected liberty interest in education, this view was not specifically followed in later decisions. Meyer did continue to stand for the proposition that education was important, but the protected liberty interest that has continued to be recognized is more in the nature of adults' freedoms in regard to procreation, marriage, and the raising of children.⁶

In a number of subsequent education-related cases that involved conflicts between the rights of the individual and the authority of the state, the Court readily recognized the importance of education. However, the issue in these decisions was not whether an individual had some protected right to an education, but whether the state had the authority to infringe on those freedoms protected by the First Amendment. During the 1930's, the Court abandoned the doctrine of substantive review of state legislation, at least in those instances where no clearly discernible constitutionally protected rights were involved. However, the Court had adopted the incorporation doctrine, by which selected protections of the Bill of Rights were applied to the states through the Due Process Clause of the Fourteenth Amendment. It should be noted that several "landmark" decisions of the Court such as West Virginia State Board of Education v. Barnette⁷ (public school children cannot be compelled to salute the flag and pledge allegiance), Epperson v. Arkansas⁸ (a statute prohibiting the teaching of the theory of evolution in public schools was unconstitutional), and Tinker v. Des Moines Independent Community School District⁹ (a rule against students wearing black armbands in school was not constitutionally permissible), turned

on those freedoms of speech and religion protected by the First Amendment, rather than on any specific liberty interest protected by the Due Process Clause.

An interesting variation on the theme of the importance of education was provided by Wisconsin v. Yoder.¹⁰ That decision turned on the balancing of the state's interest in education with the individual's right of freedom of religion. The issue in Yoder was whether the Wisconsin compulsory attendance law that required children to attend school until age sixteen could be enforced against Amish parents. Although the Amish did not object to the elementary education needed to acquire basic skills, they did object to formal education beyond the eighth grade on the grounds that high school education conflicted with Amish religious beliefs and practices. The evidence was found to support the Amish claim that enforcement of the State's requirement of compulsory formal education beyond the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs.

The Court had no doubt as to the power of the State to impose reasonable regulations for the control and duration of basic education. "Providing public schools ranks at the very apex of the function of a State."¹¹ Nevertheless, the State's interest in universal education, however highly regarded, was found to be not totally free from a balancing process when it impinged on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment.

The State's duty to protect children from ignorance could not be questioned; however, the Court pointed out that when Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there was nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. The Amish provided their children not only with a basic

education, but also with the additional training needed to pursue the Amish way of life. The State failed to demonstrate any compelling interest that justified requiring an additional two years of high school for these children. For these reasons, the Court held that the First and Fourteenth Amendment prevented the State from enforcing the compulsory attendance law against the Amish.

The Yoder decision seemed to support the notion that the Court believed the opportunity to acquire at least a basic education was particularly significant. In fact, a concurring opinion¹² joined by three justices noted that it would have been a very different case if the Amish would have claimed that their religion forbade their children from acquiring any education. However, the Amish children were permitted to acquire the basic tools of literacy needed to survive and there was little deviation from the State requirements; therefore, on balance, the interest of religious freedom prevailed.

III. THE EQUAL PROTECTION APPROACH

If the means a State employs to achieve its end involves some classification of persons, then such a law must conform to the concept of equal protection. The very act of classification is not inherently unlawful, if the particular classification is justified. To determine whether there is sufficient justification for the classification, both the nature of the classification and the nature of the interest affected are taken into account. It is within the context of equal protection analysis that the Supreme Court has dealt most directly with the question of whether there is a constitutional right to an education. The evolution of this analysis is reviewed in this section.

The importance of education in the context of equal protection was considered by the Court in the 1954 school desegregation decision, Brown v. Board of Education of Topeka.¹³ That litigation was begun on behalf of Negro children who

had been denied admission to schools attended by white children because of state laws that either required or permitted segregation by race. The Court approached its analysis of the problem by considering both the role of public education in American life and the effect of segregation itself on public education. In so doing, it provided a rather comprehensive statement regarding the significance and purpose of public education.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁴

Although the Court emphasized the importance of education, it did not go so far as to find that there was some constitutionally protected right to an education that must be provided to each individual. Rather, the right that was identified was more in the nature of equal access to whatever educational opportunity the state had undertaken to provide.

The issue in Brown was whether segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprived the children of the minority groups of equal educational opportunities. The Court believed that it did, and held that such segregation deprived these children of the equal protection of the laws

guaranteed by the Fourteenth Amendment. The Court noted that "to separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹⁵ The Court concluded that in the field of public education the doctrine of separate but equal had no place, and that separate educational facilities were inherently unequal.

The Brown analysis suggested that in some equal protection cases the Court would consider the interaction between the classification utilized and the interest affected. However, it should also be recognized that Brown was an equal protection decision in which the racial classification involved was of more consequence than the nature of the interest in education. This became apparent in subsequent decisions, as the Court struck down racial classifications used in other contexts.

The question of whether there is a right to an education that is protected by the Constitution of the United States was squarely confronted by the Supreme Court in San Antonio Independent School District v. Rodriguez.¹⁶ The case involved a constitutional challenge to the Texas school finance legislation. Although the state plan included both state and local funds, there was a heavy reliance on local property taxes, and districts with a high property tax base were able to spend more money per student than those districts with a low property tax base. The issue was whether the state plan, with the interdistrict resource disparities, violated the Equal Protection Clause. A three-judge federal district court found that wealth was a "suspect" classification and that education was a "fundamental" interest, and held that the Texas school finance system was unconstitutional. The Supreme Court reversed that district court judgment in a five-to-four decision.

Rodriguez was significant not only in terms of the educational policy considerations, but also because of the framework for equal protection analysis that was provided. The Court identified two levels of judicial review - a strict scrutiny test and a rational basis test.

The Court had found strict judicial scrutiny appropriate in reviewing legislative judgments that either interfered with fundamental constitution rights or involved suspect classifications. Strict scrutiny meant that the legislation was not entitled to the usual presumption of validity and the state rather than the complainants must carry a heavy burden of justification. In contrast, the traditional rational basis standard of review required only that the legislation be shown to bear some rational relationship to legitimate state purposes.

The Rodriguez Court concluded that the strict scrutiny test was inappropriate in that case. First, the system did not operate to the peculiar disadvantage of any "suspect" class, because no suspect class of poor people had ever been specifically identified. Second, the system did not interfere with the exercise of any "fundamental" right, because education was not such a right.

It is the Court's resolution of this second issue - Whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution - that is the special concern of this paper. Brown, Yoder, Meyer, and a number of other cases were cited in acknowledgment of both the importance of education and the vital role of education in a free society. However, the Court pointed out that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."¹⁷

The Court did not believe that it was its function "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."¹⁸ Nor was the key to discovering whether education was fundamental to be found by comparing the significance of education to that of other rights and interests. Rather, the answer lay "in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."¹⁹

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.²⁰

Those challenging the constitutionality of the state's financing plan had contended that education was distinguishable from other goods and services provided by the state because of its close relationship to other protected rights and liberties, such as freedom of speech and the intelligent utilization of the right to vote. The Court noted that it had long afforded zealous protection against unjustified interference with the exercise of those rights, but that it had never presumed to possess either the ability or the authority to guarantee the most effective speech or the most informed electoral choice.

The Court did seem to leave open the possibility that some minimal level of education might be constitutionally protected.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending are

involved and where - as is true in the present case - so charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.²¹

Several other points in Rodriguez should be noted. First, it was significant to the Court that the Texas dual financing system, rather than operating to deprive some persons of a protected right, was an affirmative act on the part of the state to remedy at least in part the existing inequities in resources. Second, the Court was very sensitive to the implications for a federal system of government if a state school financing system was struck down by the federal courts as being unconstitutional. Third, the Court believed that the education policy questions involved, including the determination of both the proper goals of education and the relationship between cost and quality, were of such a nature as to be more appropriately addressed by legislatures than by courts.

The traditional equal protection test was applied to determine whether the Texas school financing system, with its conceded imperfections, bore some rational relationship to a legitimate state purpose. The Rodriguez Court held that it did.

Under the two-tier equal protection analysis articulated in Rodriguez the selection of the standard of review tends to determine the outcome. Under the strict scrutiny standard, the burden of justification required of the state is difficult to meet; on the other hand, under the rational basis standard, the Court can find some rational relationship to legitimate state purposes in almost any legislation. As equal protection analysis has evolved through the years, some variations on the two-tier model have emerged in the Court's decisions.

In Ambach v. Norwick²² the Court demonstrated a willingness to take the importance of education as a governmental function into account as it approached the equal protection analysis. The issue in Ambach was whether a state, consistently with the Equal Protection Clause, could refuse to employ as public school teachers aliens who were eligible for citizenship but who refused to seek naturalization.

Classifications based on alienage had generally been treated as inherently suspect and subject to close judicial scrutiny. However, the Court restated "the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." The exclusions of aliens from such governmental positions did not invite as demanding a scrutiny, and the state was required to justify such a classification only by a showing of some rational relationship between the interest sought to be protected and the limiting classification.

In determining whether, for equal protection analysis, teaching in public schools constituted a governmental function, the Court looked to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. Education was again recognized as a most important function.

Public education "Fulfills a most fundamental obligation of government to its constituency." The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions: Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a

on a broad but common ground These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists ²³

The Court also noted that there was no inconsistency between this recognition of the vital significance of public education and the holding in Rodriguez that access to education is not guaranteed by the Constitution.

The teacher's role in the education process was examined and found to be of special significance.

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society (T)hrough both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitude of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.²⁴

Furthermore, it is clear that all public schools teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system Certainly a state also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects ²⁵

In light of those considerations, the Court thought it clear that teachers came well within the governmental function principle. Therefore, the Constitution required only that a citizenship requirement for teaching in the public schools bore a rational relationship to a legitimate state interest. The legitimacy of the state's interest in furthering the educational goals outlined in the opinion was undoubted, and the Court found that the citizenship qualification was rationally related to that interest.

In Ambach the importance of education was a factor in the Court's determination that the less demanding rational basis test was appropriate for reviewing state legislation that regulated how education was to be provided. This approach can be compared with that of a 1982 decision in which the importance of education was a factor the Court took into account in determining that an intermediate level of scrutiny was appropriate for deciding whether a state could refuse to provide a free public education to a certain class of children.

The nature of the right to an education that is in fact protected by the Equal Protection Clause was extended somewhat by the Court in this decision, which involved two consolidated appeals-Plyler v. Doe and Texas v. Certain Named and Unnamed Undocumented Alien Children.²⁶ The Texas statutes provided for withholding from local school districts any state funds for the education of children who were not legally admitted into the United States and also authorized local school districts to deny enrollment in their public schools to such children. The issue presented was whether, consistent with the protection of the Equal Protection Clause, Texas could deny to undocumented school-age children the free public education that it provided to children who were either citizens of the United States or legally admitted aliens. The Court held, in a five-to-four decision, that the Texas statute was unconstitutional.

After first concluding that illegal aliens may claim the protection of the Equal Protection Clause, the Court turned to the equal protection analysis. Because it is perhaps the Court's clearest statement to date regarding the equal protection standards of review (albeit in an opinion joined by only five justices), the following language is provided.

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." (citation omitted) But so too, "The Constitution does not require

things which are different in fact or opinion to be treated in law as though they were the same." (citation omitted) The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the states. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantaged a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nevertheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State ²⁷

The Court then turned to the question of which standard of review was appropriate for this case. In making this determination, both the nature of

the classification and the importance of the affected interest were taken into account.

In examining the nature of the classification involved in this case, the Court emphasized the fact that those who would bear the ultimate burden would be the minor children, rather than the adult aliens who made the decision to enter the country illegally. The Court believed that directing the onus of the parents' misconduct against the children did not comport with fundamental conceptions of justice.

To further analyze the impact of this particular legislative classification, which effectively precluded the undocumented alien children from obtaining an education, the Court recognized the importance of education and considered the results of its denial.

Public education is not a "right" granted to individuals by the Constitution. (citation omitted) But neither is it merely some government "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . (E)ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares

individuals to be self-reliant and self-sufficient participants in society." (citation omitted) Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of an education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. . . .²⁸

The Court acknowledged that the undocumented aliens could not be treated as a suspect class and that education was not a fundamental right. But because the Texas statute imposed a lifetime hardship on a class of children not accountable for their status, and did so at a certain cost to the nation, the discrimination could not be considered rational unless it furthered some substantial goal of the state.

Having determined that some intermediate level of scrutiny was the appropriate standard of review, the Court then considered whether the state had met the necessary burden of justification. In addition to the unsuccessful contention that the undocumented status of the children justified the denial of benefits afforded to other residents, the State suggested that the legislation might serve to discourage illegal immigration, that the financial resources thus expended could be used to improve the education of other children, and that these children were less likely to remain within the State to make use of the education provided. The Court rejected each of these arguments. "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial State interest. No such showing was made here."²⁹

The dissent³⁰ agreed with the majority that it was senseless to deprive

these illegal alien children of an elementary education, but believed that this was a policy question best left for legislative resolution. Given that illegal aliens did not constitute a suspect class and that education--even though its importance was beyond dispute--was not a fundamental right, the four dissenting justices believed that the Court's review should have been limited to whether the legislative classification bore a rational relationship to a legitimate state purpose. The dissenters believed that the state had a legitimate reason to so allocate its resources for education, and that therefore the statute met the rational basis test.

An interesting question that was not clearly answered in this decision is whether education per se is a sufficiently important interest to trigger some intermediate level of equal protection scrutiny, or whether this more demanding test will be applied only in these instances involving a denial of education to some discrete class of children. The opinion did seem to suggest that a narrow majority of the Court may now rank education more highly than other government benefits. Furthermore, both this case and the Brown desegregation decision seemed to indicate that the Court has been more demanding whenever the classification has not only resulted in a failure to provide equal educational opportunities, but in fact has had the adverse effect of relegating those in the affected class to an inferior position.

Perhaps the nature of the right to an education that is protected by the Equal Protection Clause is stated best by the expression "equal educational opportunity." Although there may be no substantive right to an education that is specifically provided for by the Constitution, the doctrine of equal protection does insure that whatever educational opportunities the state has undertaken to provide for the majority, essentially the same opportunities must be provided for all.

IV. THE DUE PROCESS PROTECTIONS

The Fourteenth Amendment prohibits the state from depriving a person of life, liberty, or property without due process of law. A somewhat different perspective from which to consider the nature of the interests in education that are protected by the Constitution is provided by the due process analysis.

The leading case on the procedural due process rights of public school students was Goss v. Lopez.³¹ In this five-to-four decision, the Court held that students subject to 10-day disciplinary suspensions were entitled to the protections provided by the Due Process Clause.

The school officials had contended that because there was no constitutional right to an education, the Due Process Clause did not protect students against suspensions and expulsions. The Court first pointed out that this contention misconceived the issue, and then provided the proper analysis of the nature of the protected interests.

The Fourteenth Amendment forbade a state to deprive any person of life, liberty, or property without due process of law. However, the protected property interests were not created by the Constitution, but were created and defined by independent sources such as state statutes or other rules that entitled the person to certain benefits. On the basis of state statutes providing for a free public education and for compulsory attendance, these students had legitimate claims of entitlement to a public education. Such an entitlement was a property interest protected by the Due Process Clause, and could not be taken away for misconduct without adherence to procedural due process. The Due Process Clause also prohibited arbitrary deprivations of liberty, and where a person's reputation was at stake because of what the

government was doing to him, protected liberty interests were implicated. A suspension for misconduct could damage a student's reputation and interfere with later opportunities for education or employment; therefore, the Constitution required that some procedural protections be afforded.

The Court noted that in determining whether due process requirements applied, it would look not to the weight but to the nature of the interest at stake. Even though a short suspension was a relatively mild deprivation, the Court's view was that as long as a property interest was not de minimis, the gravity was irrelevant to the question of whether the Due Process Clause had to be taken into account.

Once it was determined that due process applied, the Court turned to the question of what process was due. For short-term suspensions such as those involved in Goss, the Court held that students were entitled to at least some kind of notice and some kind of hearing. For longer suspensions or expulsions, more formal procedures would probably be required.

The question of what process is due, after it has been determined that due process applies, has been explored more thoroughly in cases subsequent to Goss.³² The Court has stated that this analysis requires consideration of three distinct factors: first, the private interest that would be affected; second, the risk of error and the probable value of different procedural safeguards; and third, the state interest, including the function involved and the administrative burdens that the different procedural requirements would entail.

That the Court has not recognized education per se as a constitutionally protected right would seem to be of some significance in the context of school discipline. If only the kind of protected property or liberty interest identified in Goss are involved, then as long as school officials follow adequate due process procedures in an administrative hearing, the Court would be unlikely to overturn

a suspension or expulsion decision on substantive grounds. In Wood v. Strickland³³ the Court made it clear that it was not the role of the federal courts to second-guess the discretion of school administrators, nor was it the purpose of 43 U.S.C. §1983 to provide a vehicle for federal court corrections of errors in the exercise of that discretion that did not rise to the level of specific constitutional guarantees.

If some level of education were a substantive constitutional right, then it would seem that the deprivation of such a right would likely entail both procedural protections and substantive justification beyond what is now required by the Goss decision.³⁴ The determination of what process is due, using the three-factor analysis, would have a different kind of individual interest to weigh in the balance, and something more than an administrative hearing might be required. Furthermore, when a student is expelled for simple misconduct, and no constitutional rights are implicated, the judicial review of the justification for that action is generally limited to an examination of the hearing record in a state court to determine whether there was some evidentiary support for the decision. Also, if constitutional rights are implicated, the reviewing court may conduct a more searching scrutiny of the evidentiary record. However, when the state acts to impinge on the exercise of a fundamental constitutional right, the burden is on the state to justify the action, and the initial forum for that determination is often a federal district court.³⁵

V. CONCLUSION

The nature of the interests in education that are protected by the Constitution may be ascertained by reference to certain due process and equal protection decisions of the Supreme Court. Although education is not a right granted by the Constitution, the Court has often recognized the importance of education, both to the individual and to the society. It seems that in terms of constitutional protections the Court has now accorded a sort of favored

legal status to education.

The exact nature of this status is unclear. The basic education necessary for functional literacy in American Society may be the extent of the protected interest. Whether that level of education is to be defined in terms of process or product remains to be seen, but it would seem that the educational opportunity, rather than an educational outcome, would be the more manageable standard for the courts. It may also be that this protected educational interest may be legally operable only as it exists in conjunction with the impact of its deprivation on a discrete class of children.

What does seem clear is that although the Constitution does not extend the right to an education, it does protect the individual against inequitable and unfair state action. Whatever educational opportunities the state does choose to provide, neither a discrete class nor a single individual may be unfairly excluded from access to those opportunities. Although the Fourteenth Amendment does not extend to every person the guarantee of success, the concepts of due process and equal protection do shield each person from state-imposed failure.

FOOTNOTES

1. 262 U.S. 390 (1923).
2. Id. at 399.
3. Id. at 399-400.
4. Id. at 400.
5. Id. at 401.
6. See, e.g., *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
7. 319 U.S. 624 (1943).
8. 393 U.S. 97 (1968).
9. 393 U.S. 503 (1969).
10. 406 U.S. 205 (1972).
11. Id. at 213
12. Id. at 237 (White, J., concurring).
13. 347 U.S. 483 (1954).
14. Id. at 493
15. Id. at 494.
16. 411 U.S. 1 (1973).
17. Id. at 30.
18. Id. at 33.
19. Id. at 33-34
20. Id. at 35.
21. Id. at 36-37
22. 441 U.S. 68 (1979).
23. Id. at 76-77.
24. Id. at 78-79
25. Id. at 79-80
26. - U.S. -, 50 U.S.L.W. 4650 (1982).
27. Id. at 4654.

28. Id. at 4655.
29. Id. at 4657.
30. Id. at 4661, (Burger, C.J. dissenting).
31. 419 U.S. 565 (1975).
32. See, e.g., Ingraham v. Wright, 430 U.S. 651, 675 (1977).
33. 420 U.S. 308, 326 (1975).
34. See Ingraham v. Wright, 430 U.S. 651, 674 n. 44 (1977).
35. See, e.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640 (1974); But cf. Harrah Independent School District v. Martin, 440 U.S. 194, 198 (1979), (tenured teacher's position not an interest entitled to protection as a matter of substantive due process.)